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Supreme Court, U.S.
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No. 96-597

In the Supreme Court of the United States

OCTOBER TERM, 1996

EDUARDO HERNANDEZ, PETITIONER

v.

MARVIN RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld a district court's grant of summary judgment where, after the employer rebutted the employee's *prima facie* case of employment discrimination, the employee offered no evidence to discredit the employer's proffered non-discriminatory reasons for the employee's termination.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-2) and district court (Pet. App. 3-17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1996. The petition for a writ of certiorari was filed on October 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. Petitioner, a Hispanic male, was employed by the United States Postal Service at the Lake Worth, Florida, Post Office from April 23, 1988, until he was removed from his position on June 25, 1988. Pet. App. 3-4. Following his removal, petitioner filed an infor-

mal EEO complaint, which the Postal Service settled on July 27, 1988. The settlement provided that the petitioner would be rehired as a part-time flexible letter carrier at the West Palm Beach Post Office for a 90-day probationary period, and that petitioner's failure to meet job requirements during that period would result in termination. Petitioner worked at the Palm Beach Gardens station of the West Palm Beach Post Office from August 13, 1988, until his removal on November 5, 1988. *Id.* at 4.

2. Petitioner filed a pro se complaint in district court alleging that the Postal Service violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, in removing him (1) on account of his national origin and (2) in retaliation for his filing an EEO complaint after his removal from the Lake Worth Post Office. Pet. App. 4. The Postal Service filed a motion for summary judgment under Fed. R. Civ. P. 56(c),[1] which the district court granted. Pet. App. 3-17.

The district court applied the "three step burden-shifting analysis" of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502 (1993). Pet. App. 6-7. The court observed that "[f]irst, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination." *Id.* at 6. Second, the court explained that "[i]f the plaintiff establishes a *prima facie* case, a presumption that the employer discriminated against him or her is created" and "the burden shifts to the

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[1] Fed. R. Civ. P. 56(c) requires summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

employer to produce evidence and 'articulate some legitimate non-discriminatory reason for the employee's [termination].'" *Id.* at 7 (quoting *Hicks*, 509 U.S. at 510 n.3). "Finally, at the summary judgment stage," the court stated, "the burden shifts back to the plaintiff to raise a genuine factual question as to whether the employer's reason for the termination was merely pretextual." Pet. App. 7. The court noted that the plaintiff could meet that burden by introducing evidence that "a discriminatory reason more likely motivated the employer or * * * that the employer's proffered explanation is unworthy of credence." *Id.* at 8. The court also stated that "the burden of persuasion always remains with the plaintiff." *Ibid.*

Applying the above principles, the court determined that petitioner "has made out a *prima facie* case of national origin discrimination." Pet. App. 8. The court then determined that the government "has clearly met [its] burden" of "articulat[ing] a non-discriminatory reason" for petitioner's termination, because "[t]he record is replete with evidence that [petitioner] did not meet the qualifications of a letter carrier" (*id.* at 11), including evaluations from supervisors documenting petitioner's inability to understand his route or to deliver mail speedily and accurately; his failure to master skills; and his lack of cooperation and unwillingness or inability to follow instructions (*id.* at 11-12, 13 n.9).

Turning its attention to petitioner's burden, the court concluded that "a review of the record reveals that [petitioner] has failed to introduce evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of

the evidence that the [petitioner] has established pretext, and that the action taken was discriminatory." Pet. App. 12. With regard to petitioner's claim of retaliatory termination, the district court similarly concluded that the "reasons for [petitioner's] termination overcome any inference of retaliation and further warrant the conclusion that the protected activity and termination were wholly unrelated." *Id.* at 14. "Viewing the evidence in the light most favorable to [petitioner]," the court found that "[t]he record is devoid of evidence suggesting pretext" and that "no reasonable trier of fact could find otherwise." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-2. The court observed that the district court concluded that petitioner "had failed to produce sufficient evidence that the employer's articulated, legitimate, nondiscriminatory reason for firing him was merely pretextual" and that the government "had met its burden of articulating a nonretaliatory reason for [petitioner's] termination and that there was insufficient evidence of pretext." *Id.* at 2. The court concluded: "We have reviewed the record [and] find no reversible error." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Petitioner argues (Pet. 5-8) that the courts of appeals are divided on the question of whether a *prima facie* case of discrimination coupled with sufficient evidence to discredit the employer's proffered reason for an adverse employment action prevent summary

judgment in favor of the employer. See, *e.g.*, *Sheridan* v. *E.I. DuPont de Nemours & Co.*, No. 94-7509, 1996 WL 659353, at *19 (3d Cir. Nov. 14, 1996) (Alito, J., concurring in part and dissenting in part) (noting split among the circuits). That question, however, is not presented by the instant case because petitioner failed to offer any evidence to support a rational fact-finder's disbelief of the Postal Service's proffered objective, non-discriminatory reasons for petitioner's termination.

Petitioner does not challenge the court of appeals' conclusion that the government met its burden of rebutting petitioner's *prima facie* case by offering legitimate, non-discriminatory reasons for terminating petitioner. Pet. App. 2, 10-12. That burden met, "the presumption raised by the prima facie case is rebutted" and "drops from the case." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 & n.10 (1981). Moreover, petitioner points to no evidence that would support a rational finding that "the presumptively valid reasons for [petitioner's termination] were in fact a cover-up for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805.

Because no evidence was presented that cast doubt on the government's proof that petitioner failed to satisfy objective standards for continued employment, the district court properly concluded that the petitioner failed to create "a genuine issue that [the government's] stated reason for termination is a pretext for national origin discrimination." Pet. App. 12; see also *id.* at 14 (concluding, as to the retaliation charge, "[t]he record is devoid of evidence suggesting pre-

text").[2] Based on those facts, summary judgment was proper. Indeed, the courts of appeals uniformly hold that when an employer carries its burden of articulating a valid, non-discriminatory reason for its action, the employee must present some evidence that the defendant's proffered reasons are pretextual. See, *e.g.*, *Woods* v. *Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994); *Woroski* v. *Nashua Corp.*, 31 F.3d 105, 108-109 (2d Cir. 1994); *Sheridan*, 1996 WL 659353, at *5-*6 (3rd Cir.); *Mitchell* v. *Data Gen. Corp.*, 12 F.3d 1310, 1316-1318 (4th Cir. 1993); *Rhodes* v. *Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc); *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994); *Collier* v. *Budd Co.*, 66 F.3d 886, 889 (7th Cir. 1996); *Rothmeier* v. *Investment Advisers, Inc.*, 85 F.3d 1328, 1336-1337 (8th Cir. 1996); *Washington* v. *Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1994); *Randle* v. *City of Aurora*, 69 F.3d 441, 450 (10th Cir. 1995); *Isenbergh* v. *Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442-443 (11th Cir.

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[2] Petitioner's only contention before the trial court regarding discrimination was that his supervisor asked petitioner (allegedly to ascertain his fluency in English) to read a performance evaluation aloud. Pet. App. 12-13. The supervisor testified, however, that she was trying to determine if petitioner understood the evaluation. The district court concluded that, "[g]iven the overwhelming evidence regarding [petitioner's] confusion and inability to follow instructions, * * * no reasonable finder of fact could find by a preponderance of the evidence that the justification for termination was pretextual and that the action taken was discriminatory." *Id.* at 13. The court noted that the record showed that his supervisor "tried to accommodate any language barrier which may have existed" but that "[i]t appears that [petitioner] had difficulty understanding instructions regardless of the language used to communicate with him." *Id.* at 13 n.9.

1996);[3] *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), cert. dismissed, 116 S. Ct. 1037 (1996).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner mistakenly cites (Pet. 5-6) the Eleventh Circuit's decision in *Isenbergh* v. *Knight-Ridder Newspaper Sales, Inc.*, 84 F.3d 1380 (1996). That decision was superseded by 97 F.3d 436. In any event, the Eleventh Circuit held in that decision that although there was "confusion" in the circuit whether a defendant was never entitled to summary judgment "whenever there is a plausible basis on which to disbelieve the employer's proffered reason for the employment decision," that issue was not controlling because the employee had "failed in creating an issue of fact about the disbelievability of the employer's reason for the hiring decision." *Id.* at 442, 443-444. This case is no different.

[4] With the exception of *Sheridan*, *Washington*, *Randle* (all arising under Title VII) and *Barbour* (arising under 42 U.S.C. 1981), the cases cited above arose under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* This Court has assumed without deciding that the burden-shifting rules in Title VII cases apply to cases under the ADEA. *O'Connor* v. *Consolidated Coin Caterer Corp.*, 116 S. Ct. 1307, 1310 (1996).